

Resolution No.: 15-1161  
Introduced: September 27, 2005  
Adopted: September 27, 2005

**COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND  
SITTING AS THE DISTRICT COUNCIL FOR THAT PORTION  
OF THE MARYLAND-WASHINGTON REGIONAL DISTRICT  
IN MONTGOMERY COUNTY**

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By: County Council

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**SUBJECT:** APPLICATION NO. G-833 FOR AMENDMENT TO THE ZONING ORDINANCE MAP, Jody Kline, Esquire, Attorney for Applicant, Germantown Station, LLC, OPINION AND RESOLUTION ON APPLICATION

Tax Account Nos. 02-00016426 and 02-03328572

**OPINION**

Application No. G-833, filed on November 11, 2004 and revised on December 4, 2004, by Applicant Germantown Station, LLC, requests reclassification from the existing I-3 (Technology and Business Park) and R-200 (Residential- single family) Zones to the R-T 8 Zone (Residential Townhouse, with maximum of 8 units per acre) of 4.5668 acres of land. The subject site is comprised of Part of Parcel 807 and Parcel 730, and it is located just south of, and adjacent to, the CSX Right-of-way, north of Lullaby Road and west of Father Hurley Boulevard, in Germantown. The application was filed under the Optional Method authorized by Code § 59-H-2.5, which permits the filing of a Schematic Development Plan (SDP), containing binding limitations with respect to land use, density and development standards or staging. Applicant proposes to build a development with “[n]ot more than 29 (twenty-nine) one-family attached [dwelling] units [, including MPDU’s].”

The Hearing Examiner recommended approval of the application on the basis that the R-T 8 Zone at the proposed location would satisfy the requirements of the zone and its purpose clause; that the proposed reclassification and development would be compatible with existing and planned land uses in the

surrounding area; and that the proposed reclassification bears sufficient relationship to the public interest to justify its approval. To avoid unnecessary detail in this Resolution, the Hearing Examiner's Report and Recommendation dated August 24, 2005 is incorporated herein by reference. Technical Staff of the Maryland-National Capital Park and Planning Commission ("M-NCPPC") and the Montgomery County Planning Board ("Planning Board") also recommended approval. The Board added the caveat that the subject proposal is "unique" and that the Board "is not encouraging other Germantown-area landowners with employment-zoned land to request zoning changes for uses other than employment."

A public hearing was convened on June 17, 2005, at which time the Applicant presented the testimony of four witnesses. There was no opposition at the hearing, and there were no letters of opposition filed in the record, although some concerns were expressed by the Gaithersburg-Germantown Chamber of Commerce, in a letter to the Chairman of the Planning Board dated March 7, 2005, about the proposed conversion of the land use from an employment-generating office building to a residential use. On the other hand, the application received support, by letter and e-mail, from three local citizen associations (the Village at Oak Hill Community Association; the Germantown Alliance; and the Germantown Citizens Association). Based on its review of the entire record, the District Council finds that the application does meet the standards required for approval of the requested rezoning for the reasons set forth by the Hearing Examiner.

The subject site is a dagger-shaped strip of land adjacent to the CSX right-of-way in Germantown. The dagger points in a northwesterly direction, with its butt end (*i.e.*, extreme eastern portion) fronting on Father Hurley Boulevard (about 130 feet of frontage), and the southern side of its handle fronting on Lullaby Road (about 600 feet of frontage). The vast majority of the 4.5668 acre tract is in the I-3 Zone; however, a small (0.12 acre), triangular shaped piece, on the southern side of the site, was after-acquired by the Applicant in a land swap with a neighbor, and it retains its R-200 classification.

There are no existing improvements on the site. The topography is such that it slopes upward from west to east and downward from Lullaby Road towards the railroad right of way. A sediment control permit was issued for the site, pursuant to which the eastern half of the property has been cleared and graded, and a retaining wall was constructed at the northern property line where it adjoins the CSX Railroad right-of-way. The western half of the property is forested with steep slopes, descending to the west. The area identified as a forest retention area has been preserved undisturbed, and a broad swale runs along the back half of the property. Technical Staff notes that there are no historic structures or sites located on the property.

Because Applicant had originally intended to erect an office building on the subject site, it obtained site plan approval from the Planning Board for a 27,000 square foot office building. Applicant now feels that the proposed townhouse community would be a more compatible development.

The surrounding area must be identified in a floating zone case so that compatibility can be evaluated properly. Technical Staff recommended describing the “surrounding area” as bounded by the CSX Right-of-way to the north, the properties fronting along Father Hurley Boulevard to the east, the properties in the Kingsview Ridge subdivision to the south, and Ranworth Drive to the west. The Applicant suggested a broader definition of the surrounding area, bound on the east by MD Route 118 (Germantown Road), on the north by Wisteria Drive, on the west by [Little Seneca Creek] in Black Hills Regional Park, and on the south, by Clopper Road. The Hearing Examiner accepted Applicant’s definition of the “surrounding area” because it is identical to the one that was accepted by the Council in Local Map Amendment G-723, where the Council rezoned the confronting property (across Father Hurley Boulevard) from the I-3 Zone to the PD-15 Zone so that a large townhouse community could be developed. For the same reason, the District Council accepts the broader “surrounding area” described above.

The surrounding area contains a mixture of land uses and densities. Immediately to the north of the subject site is the CSX Right-of-way. Northeast of the site, across Father Hurley Boulevard and north of

the CSX tracks, is Fairfield at Germantown, a development including 620 residential units and 250,000 square feet of office/retail use. Immediately to the east of the subject site, across Father Hurley Boulevard and adjacent to the CSX tracks, is the townhouse community in the PD-15 Zone which was mentioned above. Further to the east, at the eastern border of the described neighborhood, lies the Germantown Business Park, a property that has been approved for development under the I-1 and O-M zones. Immediately to the south of the subject site is the Village at Oak Hills. It is part of the Kingsview Ridge subdivision, which is a mix of single family homes and townhouses in the R-200 and R-90 Zones. The Kingsview Ridge subdivision also extends further south and west of the subject site with a development of single-family detached homes. Further south is the Germantown Estates subdivision, developed with townhouses in the R-90 zone. There are also other subdivisions developed in the R-T 6.0 and the R-200/TDR zones.

The subject property is part of Kingsview Village, as designated in the Germantown Master Plan. Kingsview Village is characterized by mixed-use residential development containing a blend of single-family detached homes, townhouses and multi-family units. The densities of the surrounding developments range from two dwelling units per acre in the development to the southwest of the subject property, to 11.9 dwelling units per acre in the property to the east of Father Hurley Boulevard. The properties further south and to the west of Father Hurley Boulevard reflect densities ranging from 5.9 to 20.9 dwelling units per acre, having been subdivided for development with a mix of townhouses and multi-family uses.

Technical Staff recounted the zoning history of the area. The subject site itself is part of a 21 acre tract owned by Applicant. It had been zoned R-200, going back to 1958, but after the Applicant bought the tract in 1989, it was rezoned in its entirety to I-3 by Sectional Map Amendment G-652, filed in conjunction with the 1989 Germantown Master Plan. A 12.8 acre portion of that tract (the portion east of Father Hurley Boulevard and south of the CSX tracks) was rezoned to PD-15 in 1996 by Local Map Amendment (LMA) G-723, as noted above. The subject site, which is across Father Hurley Boulevard from the

townhouse development that grew out of LMA G-723, remains in the I-3 Zone, except for the small triangle of property which Applicant acquired in a land-swap subsequent to the sectional map amendment. As mentioned above, that 0.12 acre sliver of land is in the R-200 Zone.

The Applicant seeks to have the subject site reclassified from its current I-3 and R-200 Zones to the R-T 8 Zone so that it can construct a maximum of twenty-nine (29) residential townhouse units, including four moderately priced dwelling units (MPDU's), with parking for 124 vehicles on the 4.5668 acre subject site. The proposed development has two distinct halves, separated by a stormwater management facility. The eastern half (i.e., the handle of the dagger) has all the structures and impervious surfaces, while the western half (i.e., the blade) has most of the green space, much of it in a Forest Conservation Easement. That western green space is labeled "HOA Open Space" on the schematic development plan (SDP), and no construction is permitted in that area because of a stream valley buffer and the forest conservation area.

Applicant does intend some green public use areas on the eastern half of the project, consisting mostly of two triangular green spaces adjacent to Lullaby Road, one with 4,787 square feet of space and the other with 4,031 square feet. Applicant has also agreed to a binding element restricting use of the open space on the western half of the site to construction of a pedestrian path so that residents can access and enjoy the large green area. Applicant indicates on the SDP that it plans to have 60% green space (although Applicant commits to 5% less, a minimum of 55%, in its binding elements). Individual units will have green space also in their yards, and streetscape amenities include landscaping, sidewalks, and street trees.

The proposal counts four parking spaces for each individual market unit, with two spaces in each rear-loading garage and two tandem spaces on each driveway, for a total of 100 spaces. For additional visitors to the development, and the MPDUs, 24 surface parking spaces are provided, bringing the total parking to 124 spaces. According to Technical Staff, there is no street parking available on this section of Lullaby Road. Vehicular access to the site will be from Lullaby Road at Bowman Ridge Drive.

It is Applicant's objective to keep the architecture compatible with nearby communities. The

townhouses will be 2½ stories tall, and the units facing Lullaby Road will have garages to the rear, along the railroad, so their parked cars will not be visible from Lullaby Road. The 24 street parking spaces are also located between the railroad and the rear of the units. The MPDU units are designed with two “back-to-back” dwelling units per structure, located in two individual structures numbered 9-10 and 28-29. These units do not include the rear-entry parking provided for the other units, but as mentioned, there is additional parking provided by surface parking spaces located as close to the buildings as possible.

The property has an approved Stormwater Management Concept Plan. There is an existing sediment trap in the middle of the site where the future stormwater management pond will be located. Following rezoning, the proposal will have to go through review and approval of a Preliminary Plan of Subdivision and a Site Plan review. No phasing schedule for construction of the development is proposed.

Although the potential of noise from the nearby CSX railroad is a concern, the report of an acoustical expert from Polysonics Corporation indicates that appropriate sound mitigation measures can be taken to insure that noise from the trains does not exceed County standards. Moreover, as noted by the Hearing Examiner, residential developments have been approved just as close to the tracks on either side of the subject site, so apparently the railroad noise can be sufficiently buffered. However, the Planning Board should certainly look into this issue at Site Plan review to assure that appropriate sound mitigation measures are taken. The Technical Staff report indicates that steps to deal with the noise problem will be considered at that time.

Pursuant to Code § 59-H-2.52, the Applicant in this case has chosen to follow the “optional method” of application. The optional method requires submission of a schematic development plan that specifies which elements of the plan are illustrative and which are binding, *i.e.*, elements to which the Applicant consents to be legally bound. Those elements designated by the Applicant as binding must also be set forth in a Declaration of Covenants to be filed in the county land records if rezoning is approved. The Applicant has filed the executed Declaration of Covenants in the administrative record of this case.

The Applicant in the present case has proposed binding elements which limit development to a maximum of 29 one-family attached units, with a maximum building coverage of 20%, and a minimum green area of 55%. Binding elements also require that Applicant not erect any building within 50 feet of an existing building, that construction in the open space on the western half of the site be restricted to construction of a pedestrian path so that residents can access and enjoy the large green area, and that only streetscape improvements may be erected in a designated area on the eastern side of the site, along the future extension of Father Hurley Boulevard. The Binding Elements in this case would give the Planning Board some flexibility to make revisions because, the density, building coverage and green space Binding Elements are expressed in maximums and minimums, rather than absolute values.

With one possible exception, the proposed development will meet, and in some instances exceed, the applicable development standards for the R-T 8 Zone. For example, maximum density is set at 8 units per acre, but Applicant's proposal calls for a density of only 6.4 units per acre. Maximum building coverage is specified as 35%, but Applicant has committed to a maximum coverage of 20%. Minimum green space in the zone is specified as 50%, but Applicant will have at least 55% green space, and plans to have 60%. Although only 58 parking spaces are required by statute, Applicant plans on 124 spaces.

The one possible exception concerns the restriction in Zoning Ordinance §59-C-1.722(a) that limits the number of "townhouses" in "any one attached row" to eight. The proposed development is comprised of four "sticks" of townhouses. None of them exceed eight structures, which Applicant refers to as "footprints," but one of the groupings contains a double MPDU unit (28-29), which brings the total number of townhouses in that stick to nine units. Zoning Ordinance §59-C-1.722(a) does not limit the number of "footprints" in a row; it limits the number of "townhouses" in "any one attached row." Since the SDP site layout is only illustrative, and Applicant's binding elements require a maximum (not an exact number) of 29 units, the District Council agrees with the Hearing Examiner's conclusion that rezoning should not be denied on that basis. Moreover, Zoning Ordinance §59-C-1.74(d)(2) permits this requirement to be waived

to accommodate increased density necessitated by the inclusion of MPDU's. Technical Staff and the Planning Board should examine, at Site Plan, whether the density has been increased so as to make this waiver provision applicable, or whether units must be rearranged or the number cut back to insure compliance with the ordinance.

A floating zone, such as the R-T 8 Zone, is flexible device. Individual property owners may seek to have property reclassified to a floating zone by demonstrating to the Council that the proposed development will be consistent with the purpose and regulations of the proposed zone and compatible with the surrounding development, as required by the case law, *Aubinoe v. Lewis*, 250 Md. 645, 244 A.2d 879 (1967), and that it will be consistent with a coordinated and systematic development of the regional district and in the public interest, as required by the *Regional District Act, Maryland-National Capital Park and Planning Commission Article (Art. 28), Md. Code Ann., § 7-110*.

Under the "purpose clause" set forth in Zoning Code §59-C-1.721, the R-T Zone may be applied if a proposal meets any one of three alternative criteria: (1) it is in an area designated for R-T Zone densities (implying a master plan designation); (2) it is in area that is appropriate for residential development at densities that are allowed in the R-T Zones; or (3) it is in an area where there is a need for buffer or transitional uses between commercial, industrial, or high-density apartment uses and low-density one-family uses.

The *Germantown Master Plan*, approved in 1989, did not designate the subject site for the R-T Zone, and thus the Purpose Clause cannot be satisfied under that criterion. However, there are three alternative methods of satisfying the Purpose Clause, and an Applicant is required to satisfy only one of them. Accordingly, the Purpose Clause may also be satisfied by development in areas "appropriate for residential development at densities allowed in the R-T Zones" or in areas "where there is a need for buffer or transitional uses between commercial, industrial, or high-density apartment uses and low-density one-family uses."

The District Council finds that the subject site satisfies both the "appropriateness" criterion and the "transitional" criterion. The proposed townhouse development would be surrounded on three sides by



residential developments, two of which include large townhouse communities (the Village at Oak Hill immediately to the south has both single-family homes and townhouses, and the townhouse development due east of the subject site, across Father Hurley Boulevard, is all townhouses). Immediately to the southwest of the site is the Kingsview Ridge development of single-family detached residences. Other residential developments within the “surrounding area” include Germantown Estates and Liberty Heights. Thus, the proposed development will be compatible with surrounding uses. Also, Applicant intends to make the architecture of the planned townhomes compatible with the architecture of the nearby residences.

The proposal would provide plenty of open space on the west end of the site and will offer the townhouses in fee simple, consistent with the stated intent of the R-T Zone “to permit the greatest possible amount of freedom in types of ownership of townhouses.” The site would also provide much more parking than required, and the proposed development would not generate enough peak hour trips to create traffic problems for the neighbors.

The District Council also finds that the proposed development will serve as a transition or buffer between the commercial/industrial/high-density residential uses to the north (*i.e.*, the railroad and the “Fairfield at Germantown” development) and the single family detached homes to the south, southwest and southeast of the site.

An application for a floating zone reclassification must be evaluated for compatibility with existing and planned uses in the surrounding area. As observed by Technical Staff, the proposal provides sufficient building setbacks, height limits, residential design and landscaping similar to existing and approved development in the neighborhood to ensure compatibility with the surrounding residences, including some nearby single-family detached homes. The proposed townhouse community would fit in with land use in the surrounding neighborhood area, which is mixed residential, including single-family detached homes, townhouses and multi-family units under several zoning classifications and constructed at densities ranging from 2 dwelling units per acre to 11.9 dwelling units per acre.

For these reasons, and those set forth in the discussion of the Purpose Clause of the R-T 8 Zone, the District Council finds that the proposed townhouse development on the subject site would be compatible with existing and proposed development in the area.

Finally, the Applicant must show that the proposed reclassification bears sufficient relationship to the public interest to justify its approval. When evaluating the public interest, the District Council normally considers Master Plan conformity, the recommendations of the Planning Board and Technical Staff, and any adverse impact on public facilities or the environment. The subject property is located in the area covered by the *Germantown Master Plan*, approved and adopted in 1989. Technical Staff correctly observes that the proposed schematic development plan does not conform to the land use and zoning recommendation in the Master Plan, which calls for the present I-3 Zone (pp. 70-71). Moreover, the Master Plan's objectives include increasing employment opportunities and reducing the number of single-family attached units as a total percentage of all housing units in Germantown (p. 30). Neither of these objectives will be advanced by the subject proposal.

On the other hand, the Master Plan is only a guide, and compliance with its recommendations is not mandatory unless the Zoning Ordinance makes it so. See *Richmarr Holly Hills, Inc. v. American PCS, L.P.*, 117 Md. App. 607, 635-636, 701 A.2d 879, 893, n.22 (1997). Since the provisions of the R-T 8 Zone (Zoning Ordinance §§59-C-1.7, *et seq.*) do not require compliance with the Master Plan, the question of whether or not to reject a requested reclassification due to lack of Master Plan compliance is a policy issue, not a legal question.

Both the Planning Board and the Technical Staff recommended approval of this application, apparently feeling that circumstances have changed significantly since the Master Plan was adopted in 1989. Technical Staff points out that job growth is expected to exceed household growth in Germantown around 2015, and that the employment yield from erecting an office building at this site would generate only 100 jobs, representing a small fraction of the 78,000 jobs that Germantown is ultimately projected to have.

Staff also observes that the desired mix of housing in Germantown will be difficult to achieve due to limitations of uncommitted land parcels and market trends.

Even more important, as noted by the Hearing Examiner, is the growth of residential land use in the immediate area of the subject site. The area designated for the I-3 Zone in the Master Plan includes not only the subject site, but also the confronting land east of Father Hurley Boulevard, adjacent to the CSX railway, and that land was reclassified by the Council to the PD-15 Zone in 1996. It is now the site of a townhouse community. That PD-15 residential development just to the east of the subject site was built after the Master Plan's adoption, as was the Village of Oak Hill residential development immediately to the south of the subject site. Thus, developments since the Master Plan's adoption have made the subject site much more compatible with a residential zone than with the I-3 Zone.

Considering these facts, the District Council finds that the value of the Master Plan's recommendation has been undermined by development in the area subsequent to its adoption. Therefore, its recommendation should not be followed in this case because to do so would lead to incompatible development. This conclusion is consistent with that reached by the Planning Board, the Technical Staff and the Hearing Examiner.

The District Council also finds that the proposed development will not adversely impact on public facilities or the environment. The evidence indicates that the 29 dwelling units proposed here are expected to generate eight elementary school students, three middle school students and five high school students, who will be served by the Ronald McNair Elementary School, Kingsview Middle School, and the Northwest High School. Collectively, they all are within the Northwest Cluster, and the current Annual Growth Policy (AGP) school tests finds capacity adequate within that cluster. Moreover, in August of 2006, a new elementary school opens in the area; in August of 2005, a new Middle School opens; and in August of 2006, a 30 room addition to the high school will open. The District Council therefore finds adequate capacity in the schools.

Turning to transportation facilities, the evidence is that the proposed development will not cause any adverse effects on local traffic and safety. A Local Area Transportation Review (“LATR”) traffic study was not required because the proposed development would not generate 30 or more peak-hour automobile trips. The proposed townhouse development will generate only 24 trips in the p.m. peak hour and 14 trips in the a.m. peak hour. According to Applicant’s transportation planning expert, Craig Hedberg, an office building on the site would generate more than twice that traffic. Mr. Hedberg and Transportation Planning Staff agree that both vehicular and pedestrian systems are safe and adequate. The District Council so finds based on the undisputed evidence.

There were no environmental issues raised in this case. The Department of Permitting Services (DPS) approved Applicant’s stormwater management concept plan on June 10, 2005, without the need for any waivers. Engineer Daniel Pino testified that it fully covers the three aspects of stormwater management, recharge of ground water, water quality and water quantity Tr. 84.

Mr. Pino also testified that a forest conservation plan, meeting all the County and Park and Planning's criteria for conservation, has been submitted and that all of Applicant’s forest conservation will be on site. Tr. 83. Environmental Planning Staff confirms that Applicant has submitted a revised Forest Conservation Plan for the subject site, and indicates that the Planning Board “will take action on the forest conservation plan with the preliminary plan of subdivision.” Exhibit 39. Considering the record, the District Council finds no evidence of adverse environmental impact from the proposed 29 unit townhouse development.

For all of these reasons, the District Council concludes, based on the preponderance of the evidence, that the proposed reclassification and development would have no adverse effects on public facilities or the environment, and that approval of the requested zoning reclassification would be in the public interest.

Based on the foregoing analysis and the Hearing Examiner’s report, which is incorporated herein, and after a thorough review of the entire record, the District Council concludes that the application satisfies the requirements of the R-T 8 Zone and its purpose clause; that the application proposes a form of

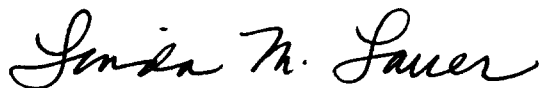
development that would be compatible with existing and planned land uses in the surrounding area; and that the requested reclassification to the R-T 8 Zone bears sufficient relationship to the public interest to justify its approval. For these reasons and because approval of the instant zoning application will aid in the accomplishment of a coordinated, comprehensive, adjusted, and systematic development of the Maryland-Washington Regional District, the application will be approved in the manner set forth below.

### ACTION

The County Council for Montgomery County, Maryland, sitting as the District Council for that portion of the Maryland-Washington Regional District located in Montgomery County, Maryland approves the following resolution:

Zoning Application No. G-833, requesting reclassification from the I-3 and R-200 Zones to the R-T 8 Zone of 4.5668 acres of land, known as Parcel 730 and part of Parcel 807 and located in the 2<sup>nd</sup> Election District south of, and adjacent to, the CSX Right-of-way, north of Lullaby Road and west of Father Hurley Boulevard, in Germantown, is hereby **approved in the amount requested and subject to the specifications and requirements of the final Schematic Development Plan, Ex. 61(a); provided that the Applicant submits to the Hearing Examiner for certification a reproducible original and three copies of the Schematic Development Plan approved by the District Council within 10 days of approval, in accordance with §59-D-1.64 of the Zoning Ordinance.**

This is a correct copy of Council action.



Linda M. Lauer, Clerk of the Council